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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

NO. 83-1571

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SUPREME COURT, U.S.

DANIEL J. McCARTHY, Director
California Department of Corrections,
and PAUL J. MORRIS, Warden,
California State Prison at Folsom,

Petitioners,

v.

DANIEL L. BRUNO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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9

TOPICAL INDEX

	Page
INTRODUCTION	1
STATEMENT OF THE FACTS AT TRIAL	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	12

TABLE OF AUTHORITIES CITED

Cases	Pages
Bradford v. Stone (9th Cir. 1979) 594 F.2d 1994	10
Chapman v. California (1967) 386 U.S. 18	10
Harrington v. California (1969) 395 U.S. 250	10,11
Hinman v. McCarthy (9th Cir. 1982) 676 F.2d 343	7
Jenkins v. Anderson (1980) 447 U.S. 231	10
Marshall v. Lonberger (1983) ____ U.S. ____ [74 L.Ed.2d 646, 657, 103 S.Ct. 843]	7
People v. Ozene (1972) 27 Cal.App.3d 905, 914, [104 Cal.Rptr. 170]	8
Rushen v. Spain (1983) ____ U.S. ____ [78 L.Ed.2d 267, 274, 104 S.Ct. 453]	7,8
Sumner v. Mata (1981) 449 U.S. 539	7,10
Sumner v. Mata (1982) 455 U.S. 591	7
United States v. Hasting (1983) ____ U.S. ____ [76 L.Ed.2d 96, 106, 103 S.Ct. 1974]	10
United States v. Valle-Valdez (9th Cir. 1977) 554 F.2d 911	10
Statute	
Cal. Evid. Code § 1150(a)	8

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INTRODUCTION

For purposes of this brief, respondent adopts the recitations in the petition for writ of certiorari respecting the opinion below, the jurisdiction of this Court, the constitutional and statutory provisions involved, the statement of the case, and the abbreviations designating the record.

STATEMENT OF THE FACTS AT TRIAL

The opinion of the California Court of Appeal contains a detailed statement of facts (Petition for Certiorari, Appendix C, pp. 2-19). For purposes of this brief respondent adopts that statement except to the extent, as demonstrated

below, that it omits some facts and misstates others which strengthened the defense case.[1]

The opinion implies that the only witnesses called by the defense to impeach William Gray were Walter Easley and Steve Farros (Appendix C, pp. 10-11). However, the defense also called Dennis Holmes, one of the Milpitas police officers to whom Karin King reported the conversation between Gray and respondent (RT 387-390; see also RT 352-57.) Officer Holmes got the impression from Ms. King that Gray had told her that he had been kidnapped at gunpoint by a Latin male, i.e., respondent, and a Latin female, i.e. Lupe. (RT 389-390, 396, 399.) Holmes was not made aware that the suspects were friends of Gray. (RT 397-398.) Thus, Holmes' testimony contradicted Gray's testimony that Gray was friends with respondent and Lupe Velasquez and that he had offered them the ride to San Jose. (RT 98-99, 204-205.)[2]

The opinion also implies that the only reason that respondent and Lupe fled was to avoid arrest by the police, whom they assumed would not believe them (Appendix C, pp. 14-15). However, respondent testified that he was also eluding the killers of Arnie Lualhati. (RT 612; see Appendix C, p. 31, fn. 2.)

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1. Each of the facts recited below was stated in the opening brief (pp. 10-18) and in the petition for rehearing (pp. 2-3) filed in the California Court of Appeal, the petition for hearing (pp. 2-3) filed in the California Supreme Court and in the petition for writ of habeas corpus (pp. 39-41) filed in the United States District Court. (ER, Tabs 1, C.)

2. The opinion states that Steve Farros saw Gray "almost daily between 1965 to 1968". This apparently is a typographical error. Farros testified that he saw Gray on almost a daily basis while he was living with Gray's sister, which was from 1965 to April 1978. (RT 415-417.)

The opinion also does not mention the defense's affirmative denial or explanation of some of the physical evidence against petitioner. Neither respondent nor Lupe recognized the rifle found in the Cougar. (RT 594, 551.) Respondent did not recognize the rifle case found in his home, but acknowledged the possibility that it was left behind by the intruders on New Year's Eve and then inadvertently placed in a closet by him when he and Lupe cleaned up afterward. (RT 635.) The sock used to gag Arnie Lualhati and the sock tied around the rifle case both are black and therefore appear to match, but the designs inside them do not match. (RT 595.)

Finally the opinion implies that the reason Mrs. Lupe Roldan contacted the defense attorneys was that her daughter Lupe Velasquez was upset after the interview (Appendix C, p. 18). However Mrs. Roldan testified that she called the defense attorneys because she was concerned that her signed statement indicated her daughter as the source of her information. (RT 668-669, 660-662.)[3/]

SUMMARY OF ARGUMENT

A determination by a state trial or appellate court that prosecutorial misconduct was cured by admonitions and instructions to the jury is a conclusion of law and therefore not to be presumed correct by a federal court on habeas corpus review under 28 USC 2254(d).

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3. Mrs. Roldan also testified that she did not think of Ron Leonard when asked about Ron Leonardo because of the difference in pronunciation between the Anglicized and Spanish versions of his last name. (RT 672-675.)

ARGUMENT

During closing argument at the state court trial in the instant case, the prosecutor attacked the integrity of defense counsel in two ways. First, he accused counsel of tampering with witness Mrs. Lupe Roldan. The state trial court overruled the objection to the attack. (Appendix C, pp. 37-39.) The state Court of Appeal found the attack to be without basis in fact and thus misconduct. (Appendix C, p. 39.) The state appellate court did not conclude that the misconduct was cured by any admonition or instruction to the jury. Rather, it simply determined that the unwarranted attack was harmless beyond a reasonable doubt. (Appendix C, pp. 42-43.) It offered no specific reasons for that conclusion.

The second attack was an accusation that defense counsel fabricated the defense for profit. The state trial court sustained an objection and admonished the jury to disregard the remark. (Appendix C, pp. 39-40.) The next morning, counsel for respondent moved for a mistrial on the ground that the harm from the misconduct was incurable. (RT 753-754.)[4/] The trial court took no evidence on the motion, but rather denied it on the ground "the comments on fees, et cetera, . . . in [the court's] judgment resulted in no prejudice." (RT 754.) Later that morning, the court read the jury a set of formula instructions. (RT 762-787.) Included among them was a general instruction not to treat statements of counsel as evidence; the instruction did not refer to any particular statement of either counsel. (RT

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4. In relevant part, counsel for respondent argued for a mistrial as follows: " . . . because of his continual . . . accusation of me contriving a defense, I believe that a mistrial is the only cure, that is, there is no way that the damage done by such an argument can ever be effaced." (RT 754.)

763.)[5] The state Court of Appeal held that the fabricatio
charge was misconduct, but that it was cured by "the trial
court's admcnition to the jury coupled with the later instr
that statements of counsel are not evidence." The court did
not explain how it reached that conclusion. (Appendix C,
pp. 40-41.)

The United States District Court agreed with the
state appellate court that both attacks on defense counsel we
misconduct. It expressly disagreed with the Court of Appeal
that the second attack was cured by admonition and instruction
(Appendix B, p. 28.) It found the attacks prejudicial,
reasoning as follows:

> "The right to counsel is a basic right that must be zealously guarded. As the court stated in McDonald, "[c]omments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of this defense cannot be considered harmless error. . . Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error." (id., at 564). We view the comments as compounding the other improper comments which implied that petitioner fabricated his defense. The

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5. In its entirety, the instruction was:

> "The attorneys for the parties have of course taken active roles in the trial of this case which has included the making of opening statements, questioning witnesses, making objections and finally arguing the case to you before you have commenced your deliberations.
>
> "Remember that the attorneys are advocates and not witnesses, and since it is your duty to decide the case solely upon the evidence, you must not consider as evidence the statement of any attorney made during the trial, except if the attorneys have agreed or stipulated to any fact, or any fact has been admitted by any attorney. Then it will be your duty to regard such fact as being conclusively proved as to the party making the stipulation or the admission, without the necessity of any further evidence of that fact." (RT 763.)

> government has not established that these comments are harmless beyond a reasonable doubt." (Appendix B, p. 29.)

Earlier, the district court stated from:

> "a review of the record . . . the case was a close one. Petitioner was not identified by either of the witnesses to the shooting. The defense impeached the credibility of the chief government witness linking petitioner to the crime, William Gray, as well as having an explanation for most of the government's circumstantial evidence." (Appendix B, p. 19.)

The Ninth Circuit Court of Appeals began its opinion by noting that respondent's conviction had been "affirmed by the California courts." (Appendix A, p. 2.) It expressly agreed with the district court that both attacks on defense counsel "were improper and not harmless beyond a reasonable doubt." (Appendix A, pp. 2-3.) The Court of Appeals did make passing reference to the state trial record. (Appendix A, p. 5.) And, its conclusion that the improper comments were calculated to impute guilt to respondent echoed similar determinations of the California Court of Appeal (Appendix C, p. 40)[6/] and the district court (Appendix B, p. 28).

In sum, the state trial court concluded the second, but not the first, attack on the integrity of defense counsel was misconduct. Thereafter, the California Court of Appeal, the United States District Court, and the Ninth Circuit

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6. The California Court of Appeal held: "There can be no doubt that the prosecutor's insinuation that defense counsel was participating in deception for profit was misconduct." (Appendix C, p. 40; emphasis added.) In context, the person with whom defense counsel was being accused of conspiracy was obviously his client.

Court of Appeals each independently determined that both attacks were misconduct. The only disagreement among the reviewing courts has been about the prejudice from the errors.

Petitioners do not have the temerity to argue to this court that the prosecutor was justified in his vicious attacks on defense counsel. Rather, they argue now for the first time that 28 U.S.C. 2254(d) required the federal courts to presume the correctness of the state appellate court rulings that some of the misconduct was cured by admonitions and instructions to the jury.

On its face, 28 U.S.C. 2254(d) accords a presumption of correctness of state court findings only to "the merits of a factual issue." Thus, the statute contemplates deference to the state court only when the federal court has "any disagreement as to the facts" or concludes that the state court "factual determinations were not supported by the record." (Sumner v. Mata (1982) 455 U.S. 591, 597; Sumner v. Mata (1981) 449 U.S. 539, 549.)

The statute does not govern a pure question of law or a mixed question of law and fact. (Marshall v. Lonberger (1983) _____ U.S. _____ [74 L.Ed.2d 646, 657, 103 S.Ct. 843]; Sumner v. Mata, supra, 455 U.S. at p. 597.) Whether federal constitutional error is harmless beyond a reasonable doubt is a question of law to which the presumption of correctness does not apply. (Rushen v. Spain (1983) _____ U.S. _____ [78 L.Ed.2d 267, 274, 104 S.Ct. 453]; accord, Hinman v. McCarthy (9th Cir. 1982) 676 F.2d 343, 350, fn. 3.)

In California, as in most jurisdictions, a juror may not testify concerning the effect of an alleged error in influencing him to assent or to dissent from the verdict or concerning the mental processes by which the verdict was

determined. (Cal. Evidence Code § 1150(a);[7/] e.g., People v. Ozene (1972 27 Cal.App.3d 905, 914 [104 Cal.Rptr. 170] [juror may not testify to coercive effect of allegedly erroneous jury instruction]; see Rushen v. Spain, supra, 78 L.Ed.2d at p. 274, fn. 5.)

Notwithstanding these authorities, petitioners complain that neither federal court in the instant case gave any deference to the state appellate court's conclusion that admonitions by the trial judge obviated any harm from the prosecutor's statements (i.e., the charge of fabrication for profit). (Petition for Certiorari, p. 29.) In accordance with California law, however, no evidentiary hearing was held on the subjective effect of the misconduct or the admonitions, given that they were directly related to the specific issues of credibility before the jury. (Contrast Rushen v. Spain, supra.) Thus, the conclusion that the error was cured required no findings of fact. Under state statute, it was a question of law. Accordingly, that conclusion was no different than a ruling that the error was harmless. Indeed, petitioners themselves seem to equate the two in complaining

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7. California Evidence Code section 1150(a) provides:

> "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental process by which it was determined." (Emphasis added.)

that "a federal court should not be allowed to simply reject out of hand the state court's finding of harmless error." (Petition for Certiorari, p. 27.)

Upon analysis, the question petitioners present already has been resolved by this court against them. The question concerns only one of the two attacks on the integrity of defense counsel. Petitioners give this court no reason to believe that the Ninth Circuit's disposition would be any different even if the question were resolved in their favor. And, the state court findings to which petitioners would now have the federal courts defer are conclusory in form. No useful purpose would be served by granting the petition.

Petitioner's other complaints in passing about the federal courts in this case are refuted on the face of their decisions.

Neither court rejected "out of hand" the state appellate court's determination that admonitions obviated any harm from the charge of fabricating the defense (Petition for Certiorari, p. 29). As noted above, the district court reasoned that the error was fundamental in nature, and struck at the core of the defense in a close case. (Appendix B, pp. 28-29, 19.) The Ninth Circuit expressed its agreement with the district court and stressed the fundamental nature of the error. (Appendix A, pp. 2-9.)

Neither federal court made a factual finding at odds with that of a state court. Thus, neither was required under 28 U.S C. 2254(d) to state it was deferring to state findings of fact.

Both courts expressly determined that the misconduct was not harmless beyond a reasonable doubt. Thus, neither court relied on non-existent supervisory powers over state courts to grant habeas corpus relief.[8/]

Both courts based their finding of prejudicial error on a review of the whole record. The district court expressly stated that it had. (Appendix B, p. 18.) The Ninth Circuit cited Chapman v. California (1967) 386 U.S. 18 and United States v. Valle-Valdez (9th Cir. 1977) 554 F.2d 911, 915, fn. 5-8. Since Chapman this Court has made clear that a court reviewing constitutional error has the duty to consider the record as a whole to determine whether it is harmless beyond a reasonable doubt. (See United States v. Hasting (1983) _____ U.S. _____ [76 L.Ed.2d 96, 106, 103 S.Ct. 1974], citing Harrington v. California (1969) 395 U.S. 250.) The Ninth Circuit presumably was aware of that duty and faithfully performed it. (See Sumner v. Mata, supra, 449 U.S. at p. 549.) Its citation to Valle-Valdez reinforces that conclusion, since

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8. There is nothing distressing about the Ninth Circuit's criticism of the comments in the prosecutor's opening argument. Those comments had been assigned as misconduct in the opening brief (p. filed in the Court of Appeal (ER; Tab C.) That court reached the merits of the argument despite the lack of the objection. (Appendix C, pp. 37-39.) There was thus no ban to their consideration on federal habeas corpus review. (Bradford v. Stone (9th Cir. 1979) 594 F.2d 1994, 1996, fn. 2.) Petitioners did not raise any objection to assignment of those comments as misconduct in the petition for writ of habeas corpus. (ER, Tab 1, p. 34; ER, Tab 4.) They cannot now be heard to make such an objection. (Jenkins v. Anderson (1980) 447 U.S. 231, 234, fn. 1.) In any event, the comments in the opening argument place in context those made in the closing argument to which an objection was made.

that case cites Harrington in its discussion of prejudice. Further, the Ninth Circuit did refer in passing to the record. (Appendix A, p. 5.)

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CONCLUSION

The prosecutor at respondent's trial resorted to flagrant misconduct in order to obtain a conviction. The state appellate court affirmed the conviction without articulating reasons why the misconduct was harmless beyond a reasonable doubt. Both federal courts, on the other hand, articulated sound reasons for concluding the misconduct was prejudicial.

For the first time in this court, petitioners argue that the state court's determination of harmless error was really a finding of fact, rather than law, to which the federal courts should have deferred. The petition for writ of certiorari thus presents no real issue for this Court to resolve. The affirmance of the order granting habeas corpus relief should remain undisturbed.

DATED: June 7, 1984

Respectfully submitted,

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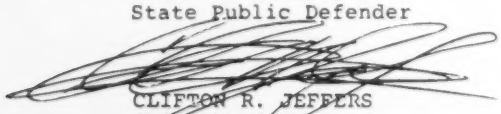

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